

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANITA BLACKWEASEL,)
Plaintiff,) CASE NO. C05-2054-MJB¹
v.) MEMORANDUM OPINION
JO ANNE B. BARNHART,)
Commissioner of Social Security,)
Defendant.)

Plaintiff Anita Blackweasel appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (the “Commissioner”) denying her application for Supplemental Security Income under Title XVI of the Social Security Act. For the reasons set forth below, the Court REVERSES the Commissioner’s decision and REMANDS for further proceedings.

I. PROCEDURAL HISTORY

On October 1, 2002, Plaintiff protectively filed an application for Supplemental Security Income (“SSI”). (Tr. 63-67.) Plaintiff alleged disability since December 31, 1993 due to back problems and arthritis. (Tr. 64, 74.) On March 5, 2003, Plaintiff filed a Reconsideration Disability Report additionally alleging depression. (Tr. 110.) The claim was denied initially and

¹ Pursuant to the consent of the parties, this case proceeds before the undersigned in accordance with 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13.

1 upon reconsideration. (Tr. 30-33, 40-42.) A hearing was held before Administrative Law Judge
 2 (“ALJ”) M. J. Adams on March 31, 2005. (Tr. 443-58.) Plaintiff was represented by counsel
 3 and testified at the hearing. (*Id.*) Vocational expert Michael Swanson also testified at the
 4 hearing. (*Id.*) On June 16, 2005, the ALJ issued a decision finding that Plaintiff was not
 5 disabled. (Tr. 17.) The Appeals Council denied Plaintiff’s request for review², making the ALJ’s
 6 decision the final decision. (Tr. 5.) Plaintiff timely filed her appeal with this Court. (Dkt. #1.)

7 **II. THE PARTIES’ POSITIONS**

8 Plaintiff requests that the Court reverse the ALJ’s decision and award benefits.

9 (Dkt. #11.) Plaintiff argues that the ALJ erred in (1) finding her pain syndrome is a not a severe
 10 impairment, (2) failing to provide specific and legitimate reasons supported by the record for
 11 rejecting the opinions of three examining doctors, (3) rejecting her subjective testimony, and (4)
 12 ignoring relevant vocational expert testimony. (Dkt. #11.) The Commissioner argues that the
 13 ALJ’s decision should be affirmed because it was supported by substantial evidence. (Dkt. #13).

14 **III. STANDARD OF REVIEW**

15 The court may set aside the Commissioner’s denial of social security disability benefits
 16 when the ALJ’s findings are based on legal error or not supported by substantial evidence in the
 17 record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is
 18 defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence
 19 as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*,
 20 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving
 21 conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
 22 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation,

24 ² Plaintiff provided to the Appeals Council additional evidence consisting of an abstract on
 25 the interpretation of Waddell’s signs. (Tr. 8.)

1 it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639,
2 642 (9th Cir. 1982).

3 IV. EVALUATING DISABILITY

4 The claimant bears the burden of proving that she is disabled. *Meanel v. Apfel*, 172 F.3d
5 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial
6 gainful activity by reason of any medically determinable physical or mental impairment, which
7 can be expected to result in death, or which has lasted or can be expected to last for a continuous
8 period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

9 The Social Security Administration regulations set out a five-step sequential evaluation
10 process for determining whether a claimant is disabled within the meaning of the Social Security
11 Act. See 20 C.F.R. § 416.920. At step one, the claimant must establish that she is not engaging
12 in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the
13 claimant must establish that she has one or more medically severe impairments or a combination
14 of impairments. If the claimant does not have a "severe" impairment, she is not disabled. *Id.* at §
15 (c). At step three, the Commissioner determines whether the claimant's impairment meets or
16 equals any of the listed impairments described in the regulations. A claimant who meets one of
17 the listings is disabled. See *Id.* at § (d).

18 At step four, if the claimant's impairment neither meets nor equals one of the impairments
19 listed in the regulations, the Commissioner evaluates the claimant's residual functional capacity
20 and the physical and mental demands of the claimant's past relevant work. *Id.* at § (e). If the
21 claimant is not able to perform her past relevant work, the burden shifts to the Commissioner at
22 step five to show that the claimant can perform some other work that exists in significant
23 numbers in the national economy, taking into consideration the claimant's residual functional
24 capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d 1094,

1 1100 (9th Cir. 1999). If the Commissioner finds the claimant is unable to perform other work,
2 then the claimant is found disabled.

3 **V. SUMMARY OF THE RECORD EVIDENCE**

4 Plaintiff was last insured for Disability Insurance Benefits on December 31, 1982.
5 (Tr. 68.) Plaintiff is currently 46 years old. (Tr. 64.) Plaintiff has a General Equivalency
6 Diploma. (Tr. 80.) Plaintiff has worked as a cashier, housekeeper, cook, meat trimmer, forest
7 fighter camp crew member, laundry worker, telemarketer, day laborer, fisher person, assistant
8 librarian, and substitute teacher. (Tr. 75, 88-94.)

9 Because the parties have adequately summarized the record in their briefing, and because
10 much of the record evidence is not relevant given the scope of the issues, this Court will not
11 summarize the record here. Relevant evidence will be referenced as appropriate in the
12 discussion.

13 **VI. THE ALJ'S DECISION**

14 At step one, the ALJ determined that Plaintiff had not engaged in substantial gainful
15 activity at any time since the alleged onset of disability. (Tr. 18, 26.) At step two, the ALJ
16 found that Plaintiff has depression and degenerative disc disease of the lumbar spine, and that
17 they are severe impairments. (Tr. 21, 26.) The ALJ further found that Plaintiff's bilateral knee
18 osteoarthritis, asthma, pain disorder with medical and psychological factors, alcohol and heroin
19 abuse, and metacarpal fracture are not severe impairments, and that she has no medically
20 determinable impairment related to her complaints of hip and hand pain. (*Id.*) The ALJ also
21 found that Plaintiff's allegations regarding her limitations were not totally credible. (Tr. 23, 26.)
22 At step three, the ALJ found that Plaintiff's medically determinable impairments do not meet or
23 medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4. (Tr.
24 21-22, 26.)

At step four, the ALJ determined that Plaintiff has the residual functional capacity to do the following: (1) lift and/or carry twenty pounds occasionally and ten pounds frequently; (2) stand and/or walk for a total of two hours in an eight-hour workday, and (3) sit for a total of six hours in an eight-hour workday, provided that she be allowed to alternate between sitting, standing, and/or walking at thirty minute intervals; (4) occasionally climb stairs, balance, kneel, crouch, and crawl, and frequently stoop; (5) understand, remember, and carry out simple instructions, make simple work-related decisions, respond appropriately to supervisors, co-workers, and usual work settings, and deal with changes in a routine work setting. (Tr. 23-24, 26.) The ALJ also determined that Plaintiff should avoid concentrated exposure to hazards and vibration. (Tr. 23, 26.)

At step five, the ALJ found that Plaintiff is a younger individual with the equivalent of a high school education and no past relevant work. (Tr. 25, 26.) The ALJ determined that although Plaintiff's exertional limitations do not allow her to perform the full range of sedentary or light work, a significant number of jobs exist in the national economy that she could perform, including work in small parts assembly and hand packaging. (Tr. 27.)

VII. DISCUSSION

A. Examining Physicians' Opinions

Plaintiff argues that the ALJ erred in failing to provide specific and legitimate reasons supported by the record for rejecting the opinions of her examining physicians, Dr. James LoGerfo, Dr. Sohail K. Mirza, and Dr. Shoshanna Press. As a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do not treat the claimant. *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987). Where the treating doctor's opinion is not contradicted by another doctor, it may be rejected only for "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th cir. 1996) (citing *Baxter v. Sullivan*, 923 F.2d

1 1391, 1396 (9th Cir. 1991)). “Clear and convincing” reasons are also required to reject the
2 treating doctor’s ultimate conclusions. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988).
3 Even if the treating doctor’s opinion is contradicted by another doctor, the Commissioner may
4 not reject this opinion without providing “specific and legitimate reasons” supported by
5 substantial evidence in the record for doing so. *See Lester*, 81 F.3d at 830; *Magallanes v.*
6 *Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989).

7 The ALJ assigned substantial weight to the findings of Dr. Fleming, a state agency
8 medical consultant because, although he did not examine Plaintiff, he is an expert in evaluating
9 the medical issues in disability claims before the Social Security Administration. (Tr. 24.) The
10 ALJ also adopted the findings of state agency medical consultant, Dr. Reade, regarding the
11 functional limitations arising from Plaintiff’s mental impairments. The ALJ adopted Dr. Reade’s
12 findings because they were consistent with Plaintiff’s actual functioning as demonstrated by her
13 daily activities and performance on mental status examination. (Tr. 24.) In adopting the medical
14 consultants’ opinions, the ALJ largely rejected the opinions of Plaintiff’s examining and treating
15 physicians. (Tr. 24.)

16 **Dr. LoGerfo**

17 On January 29, 2003 and April 9, 2003, Dr. LoGerfo opined that Plaintiff was severely
18 limited and unable to perform at least half-time work. (Tr. 279, 215.) The Physical Evaluation
19 form defines “severely limited” as an inability to lift at least two pounds or stand and/or walk.
20 (*Id.*) The ALJ rejected Dr. LoGerfo’s opinion because the limitations were not supported by the
21 objective evidence. (Tr. 24.) The ALJ also noted that Dr. LoGerfo had encouraged Plaintiff to
22 increase her walking and activity level, and that examining physician Dr. Paynter had encouraged
23 Plaintiff to be active, assuring her that she would not likely hurt herself as long as she used
24 proper ergonomics. (*Id.*)

1 First, the fact that Drs. LoGerfo and Paynter encouraged Plaintiff to increase her activity
2 level does not directly contradict the opinion that she was severely limited. Second, regarding
3 objective evidence, Dr. LoGerfo does not, in his treatment notes, specifically observe or assess an
4 inability to lift two pounds or stand and/or walk. In fact, he frequently observes that Plaintiff
5 walks with a normal gait (Tr. 182, 185, 335, 361, 402) or without difficulty (Tr. 322). However,
6 he also observed limping. (Tr. 176, 334.) In addition, he observed mild joint tenderness in
7 Plaintiff's left third finger, rheumatic symptoms, edema in the extremities bilaterally, and palpable
8 muscle spasm bilaterally. (Tr. 320, 333, 335.)

9 Dr. LoGerfo assessed Plaintiff as having significant problems with pain (Tr. 186), for
10 which he prescribed medication. (Tr. 176, 186, 322, 333, 335, 340.) He also assessed Plaintiff as
11 having significant depressive symptomatology (Tr. 186), for which he prescribed antidepressants.
12 (Tr. 182, 361.) Even before Plaintiff's psychiatric evaluation, Dr. LoGerfo had recognized a
13 possible psychological component in Plaintiff's pain issues when he noted that pain medications
14 would be adjusted, depending, in part, on whether the pain improved with increased levels of
15 antidepressants. (Tr. 182.)

16 In conclusion, while the objective physical evidence is sparse, Dr. LoGerfo's opinion
17 appears to be based not only on that evidence, but also on his assessment that Plaintiff's pain
18 problems are significant and that she suffers from pain syndrome. (Tr. 332, 397) He also gives
19 credence to the possible psychological factors involved in the pain and its significant depressive
20 symptomatology. For these reasons and in light of Dr. Press' diagnosis of pain disorder with both
21 medical and psychological factors (discussed below), this Court finds that the ALJ has failed to
22 provide specific and legitimate reasons supported by substantial evidence in the record for
23 rejecting Dr. LoGerfo's opinion.

1 Dr. Mirza

2 On January 14, 2004, Dr. Mirza opined that Plaintiff was limited to sedentary work, and
3 that her inability to perform at least half-time work was permanent. (Tr. 277.) The ALJ's stated
4 reason for rejecting Dr. Mirza's opinion was that the Plaintiff had undergone back surgery only
5 one month earlier. (Tr. 24.) The ALJ also noted that Dr. Mirza had encouraged Plaintiff to walk
6 as much as possible, and that she had subsequently reported walking four to five hours daily.
7 (*Id.*) While Plaintiff had undergone surgery only one month before, Dr. Mirza did not indicate
8 that her limitations were likely to improve at a later date. On the contrary, he stated that
9 Plaintiff's inability to work at least halftime was permanent. (Tr. 277.) As noted above,
10 encouraging locomotion does not plainly contradict an assessment of "severely limited." Nor is
11 it inconsistent with a limitation of sedentary work, the definition of which recognizes that a
12 certain amount of walking may be necessary. (*Id.*)

13 The notation that Plaintiff was walking four to five hours daily occurred in a report dated
14 February 2004, only two months after she had undergone two back surgeries one week apart.
15 (Tr. 363.) At that time Plaintiff had not yet been released for physical therapy. (Dkt. #17.) The
16 notation is contradicted consistently throughout the remainder of the record. In March 2004,
17 Plaintiff reported walking four to six times *a week* for 30-60 minutes, "stop and go." (Tr. 359.)
18 In June 2004, August 2004, and March 2005, Plaintiff indicated an ability to walk only 1-1½
19 blocks at a time. (Tr. 338, 335, 453.) The February 2004 report appears to be an anomalous
20 notation which is inconsistent with several later reports that demonstrate Plaintiff's extremely
21 lower level functioning; thus, it does not appear to be reliable. For these reasons, this Court
22 finds that the ALJ has not provided specific and legitimate reasons supported by substantial
23 evidence in the record for rejecting Dr. Mirza's opinion.

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1 Dr. Press

2 On July 15, 2003, Dr. Press conducted a psychiatric evaluation of Plaintiff, diagnosing
3 her with a pain disorder with both medical and psychological factors, opiate dependence,
4 currently prescribed for pain, alcohol dependence in sustained, full remission, major depressive
5 disorder with psychotic features, chronic pain, and a Global Assessment of Functioning (GAF) of
6 47. (Tr. 226.) Dr. Press opined that Plaintiff could not perform work activities on a consistent
7 basis, maintain regular attendance in the workplace, complete a normal workday or workweek,
8 or deal with the usual stress encountered in competitive work. (Tr. 227.) The ALJ rejected this
9 opinion. (Tr. 24.) Dr. Press further opined that although Plaintiff's problems were partially
10 treatable, her likelihood of recovery was poor and unlikely to improve within the next twelve
11 months. (Tr. 226.) Dr. Press indicated that Plaintiff had severe pain problems and would benefit
12 from receiving psychiatric evaluation and treatment. (*Id.*)

13 In rejecting Dr. Press' opinion, the ALJ noted that although Plaintiff complained of
14 paranoia and auditory hallucinations at her evaluation, the evidence did not document ongoing
15 psychotic symptoms. (Tr. 24.) The ALJ also noted that Plaintiff had not received treatment
16 from a mental health specialist, and that her psychotropic medications were prescribed by her
17 primary care physician. (*Id.*) It is not clear how the fact that Plaintiff discussed her psychotic
18 symptoms with a psychiatrist rather than with her primary care physicians is evidence against
19 those symptoms. While Plaintiff had not received treatment from a mental health specialist, such
20 treatment had never been offered to her. (Tr. 474.) Dr. Press determined that Plaintiff would
21 benefit from psychiatric treatment, (Tr. 226) and Plaintiff has indicated that she would go to
22 counseling if it were offered. (Tr. 474.) The ALJ does not make it clear how the fact that
23 Plaintiff's antidepressants were prescribed by her primary care physician supports rejection of Dr.
24 Press' opinion. Plaintiff had not yet seen a psychiatrist at the time antidepressants were first

1 prescribed for her. (Tr. 186, 222.) Dr. LoGerfo prescribed them in view of her significant
2 depressive symptomatology. (Tr. 186.)

3 This Court finds that the opinions of Plaintiff's three examining and treating physicians
4 are consistent and unanimous in their assessment of Plaintiff's inability to work at least half-time
5 or on a consistent basis. Further, the ALJ has failed to state specific and legitimate reasons
6 supported by substantial evidence in the record for rejecting these opinions.

7 B. Plaintiff's Subjective Testimony

8 Plaintiff argues that the ALJ did not provide clear and convincing reasons supported by
9 specific facts for rejecting Plaintiff's subjective testimony regarding pain and related symptoms.
10 In rejecting Plaintiff's testimony, the ALJ must perform a two-step analysis. *Smolen v Chater*,
11 80 F.3d 1273, 1281 (9th Cir. 1996). The first step requires the plaintiff to produce objective
12 medical evidence of an underlying impairment which could reasonably be expected to produce
13 the alleged symptoms. (*Id.*) In addition, there must be no evidence of malingering. (*Id.*) In the
14 present case, Plaintiff met this burden by presenting medical evidence of her pain disorder with
15 both medical and psychological factors. (Tr. 226.) Likewise, there is no evidence in the record
16 indicating that Plaintiff was malingering, and the Commissioner so concedes. (Dkt. #13.)

17 The second step requires the ALJ to analyze the credibility of a Plaintiff's testimony
18 regarding the severity of her symptoms. The ALJ can reject a Plaintiff's symptom testimony only
19 if he makes specific findings, stating clear and convincing reasons for doing so. *Dodrill v.*
20 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). In weighing a claimant's credibility, the ALJ may
21 consider her reputation for truthfulness, inconsistencies either in her testimony or between her
22 testimony and her conduct, unexplained or inadequately explained failure to seek treatment or to
23 follow a prescribed course of treatment, her daily activities, work record, and testimony from
24 physicians and third parties concerning the nature, severity, and effect of the symptoms of which

1 she complains. *See Smolen*, 80 F.3d at 1284 (citations omitted).

2 In the present case, Plaintiff testified that she has worked at numerous jobs, including,
3 *inter alia*, cleaning motel rooms, cashiering, meat-trimming, and telemarketing. (Tr. 445-46.)
4 She has had to switch jobs and work fewer hours due to constant pain which made her unable to
5 stand, sit, or walk for very long, and which made bending and lifting difficult. (Tr. 74.) She
6 used to clean her whole house in an hour, but at the time of her initial application, it took her an
7 hour to do dishes, 45 minutes to sweep the floors, and an hour to mop them, as she had to stop
8 and rest about every ten minutes due to pain. (Tr. 97-98.) Later, the only housework she was
9 able to do was wash dishes, which took her awhile due to the need to stop and rest. (Tr. 115.)
10 Others had to help her with the housework and with shopping, and friends had to bathe her son,
11 as her pain prevented her from doing so herself. (Tr. 115, 224, 448.) She is no longer able to do
12 her cultural handicrafts due to pain. (Tr. 449-50.)

13 The ALJ stated a number of reasons in support of his finding that Plaintiff was not
14 entirely credible. (Tr. 23.) First, the ALJ found Plaintiff's testimony that friends assisted her
15 with housework to be inconsistent with her activity questionnaire report that "she could wash
16 dishes for an hour, sweep the floor for 45 minutes at a time, and mop the floor for an hour."
17 (*Id.*) However, Question 8 on the questionnaire asks not how long Claimant can do chores, but
18 rather how long it takes to do them. (Tr. 97.) Thus, what the ALJ states as an ability to perform
19 for 45-60 minutes continuously, is actually the total time required to perform the task, which
20 Plaintiff indicates that she must do in ten minute increments interspersed by periods of rest.
21 (Tr. 97-98.) Plaintiff also reported in her Activities of Daily Living and Socialization
22 questionnaire and to Dr. Press that friends helped her with housework. (Tr. 115, 224.) Based
23 on a careful reading of the record, I find that the plaintiff's testimony and reports are consistent
24 regarding her ability to do housework.

1 Second, although the ALJ found that Plaintiff suffers from depression (Tr. 21), he bases
2 his credibility findings, in part, on inconsistencies regarding her depression. (Tr. 23.) The ALJ
3 observed that whereas Plaintiff reported her depression to Dr. Press as 9½ -10 out of 10, she was
4 not referred for counseling. (*Id.*) However, the examining psychiatrist determined that Plaintiff
5 would benefit from receiving evaluation and treatment from a psychiatrist. (Tr. 226.) Moreover,
6 Plaintiff indicated that she would go to counseling if referred. (Tr. 474.) The ALJ also noted
7 that Plaintiff was off psychotropic medications for several months despite her acknowledgment
8 that her depressive symptoms improved with medication. (Tr. 23.) The ALJ found that this
9 suggested that Plaintiff was not suffering from significant depressive symptoms during “that
10 period.” (*Id.*) It is not clear whether the ALJ is referring to the initial period during which
11 Plaintiff took antidepressants or to the hiatus in which she did not. Nor does the ALJ make clear
12 how improvement of depressive symptoms followed by a medication hiatus indicates a lack of
13 significant depression or, in turn, a lack of credibility. The ALJ did not inquire of Plaintiff as to
14 the reason for her temporary cessation of antidepressant medication, therefore this Court finds
15 that the record has not been fully developed on this issue.

16 Third, the ALJ found that Plaintiff exaggerated her physical complaints based on the fact
17 that she had 5/5 Waddell’s signs. (Tr. 23.) However, this conclusion appears to be based on a
18 misinterpretation of the Waddell’s signs. Plaintiff submitted additional evidence on this subject
19 to the Appeals Council. (Tr. 4.) In an abstract taken from a posting on the website of the
20 National Center for Biotechnology Information, a division of the National Library of Medicine at
21 the National Institutes of Health, Dr. Waddell writes:

22 Despite clear caveats about the interpretation of the signs, they have been
23 misinterpreted and misused both clinically and medicolegally. Behavioral
24 responses to examination provide useful clinical information, but need to be
25 interpreted with care and understanding Multiple signs suggest that the
26 patient does not have a straightforward physical problem, but that

1 psychological factors also need to be considered Behavioral signs are not
2 on their own a test of credibility or faking.

2 (Tr. 442.)

3 Rather than suggesting exaggeration, the 5/5 Waddell's signs tend to lend credence to
4 Plaintiff's complaints within the context of the pain disorder. Furthermore, both the consulting
5 psychiatrist and examining physician have diagnosed Plaintiff with depression. (Tr. 226, 278.)
6 Thus, this Court's careful consideration of the record supports the finding that Plaintiff's 5/5
7 Waddell's signs was not a convincing basis for the ALJ to reject her pain testimony.
8

9 Fourth, regarding Plaintiff's physical abilities, the ALJ noted the following as
10 inconsistencies: (1) Plaintiff complained of maximal pain during a physical therapy visit, but
11 appeared to walk and move about with relative ease, and later reported that her pain was tolerable
12 with medication; (2) Plaintiff claimed at the hearing that she could walk only 1.5 blocks before
13 needing rest, but had reported to Dr. Mirza that she was walking four to five hours daily; (3)
14 Plaintiff traveled to Montana in mid 2004; and (4) the activities associated with parenting a small
15 child are consistent with medium level work.
16

17 The record indicates fluctuating difficulty with gait ranging from normal, to waddling,
18 limping, and slightly ataxic (Tr. 182, 335, 361, 155, 176, 334, 187). The record also indicates
19 fluctuating degrees of pain and of the ability of medications to control it. (Tr. 74, 81, 82, 96-98,
20 110, 114, 149, 151, 153, 155, 176, 182, 185, 187) Plaintiff has reported that her pain is affected
21 by weather (Tr. 96, 187, 408), and that it is intermittent. (Tr. 155.) Plaintiff's reports on her pain
22 cover a range of time since before her October 2002 application to her hearing in March 2005. In
23 her March 2003 reconsideration report, she reported that her pain had gotten worse. (Tr. 110.)
24 Accordingly, this Court finds that an occasional report of Plaintiff's pain being tolerable is not
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1 inconsistent with the overall record, nor indicative of a lack of credibility considering the length of
2 time covered, Plaintiff's reports on pain fluctuation, and the psychological factors involved in her
3 pain disorder.

4 The ALJ does not explain how traveling to Montana bears upon Plaintiff's credibility, and
5 the record lacks support for the conclusion. The record indicates that Plaintiff receives
6 significant help from others in caring for her son and that her own activity levels in this regard are
7 minimal. (Tr. 115, 123, 448.) Plaintiff reported to her health care provider in September 2002
8 that her pain was worsening, her mobility decreasing, and that taking care of her toddler was
9 "very difficult." (Tr. 151.) This Court therefore concludes that what parenting Plaintiff is able to
10 do is not inconsistent with her reports of pain and physical inability.

12 Fifth, the ALJ concluded that Plaintiff's pre-disability work history reflects on her
13 credibility, finding that her low earnings indicated a predilection for unemployment. Plaintiff's
14 claimed disability began in 1993. (Tr. 64.) She had two minor children during this period. (Tr.
15 447-448.) Whether her work history at that time was based on a predilection for unemployment,
16 for homemaking, or for some other reason is not clear from the record. The Commissioner
17 argues that Plaintiff completed only one-half of her physical therapy. However, Plaintiff reported
18 that therapy tended to make her symptoms worse and that she felt it was not much help. (Tr.
19 342.) This Court finds that the ALJ has not provided a reason for finding this explanation
20 incredible.

22 In addition, it is noteworthy that the record lacks any indication on the part of the
23 examining physicians that Plaintiff exaggerates her experience or lacks credibility. It is also worth
24 noting that Plaintiff was completely forthcoming about her temporary street drug use during the
25

1 period she was without prescription analgesics.

2 Finally, the nature of Plaintiff's pain disorder is of particular importance to this case. This
3 is a disorder with both medical and psychological factors. Because a pain disorder must be ruled
4 out if the patient intentionally produces or feigns her symptoms (DSM-IV-TR 307.89), the
5 consulting psychiatrist must necessarily consider this possibility. The fact that Dr. Press
6 diagnosed the plaintiff as suffering from a pain disorder tends to support a finding of credibility.
7 Further, this diagnosis presumes that the patient's symptoms cannot be explained entirely by a
8 general medical condition. (*Id.*) The condition is primarily a mental disorder. (*Id.*) To the extent
9 that the ALJ's credibility findings are derived from the nature of the condition itself, a circularity
10 exists.

12 In sum, the Court finds that the ALJ has not provided clear and convincing reasons for
13 rejecting Plaintiff's subjective symptom testimony. While the ALJ made specific findings in some
14 instances, these findings were based on a misreading of the record. In particular, the record
15 contradicts the findings regarding Plaintiff's endurance in performing housework and in walking,
16 the significance of the Waddell's signs, and the extent of her parenting activities. Other findings
17 require greater specificity as to reasoning or further development of the record, including the
18 conclusions based on Plaintiff's temporary cessation of antidepressants, her pre-disability work
19 history, and her trip to Montana. Most importantly, this Court finds that the ALJ fails to
20 adequately explain his credibility findings in light of Plaintiff's pain disorder with medical and
21 psychological factors.

23 C. ALJ's Finding that Plaintiff's Pain Disorder is Not a Severe Impairment

24 Plaintiff argues that the ALJ's step two finding that her pain disorder is not a severe

1 impairment is in error. A claimant's impairment, or combination of impairments, is not severe if it
2 does not significantly limit the claimant's physical or mental ability to do basic work activities. 20
3 C.F.R. §§ 404.1520(c), 404.1521(a). Basic work activities are defined as the abilities and
4 aptitudes necessary to do most jobs, such as (1) walking, standing, sitting, lifting, pushing,
5 pulling, reaching, carrying, or handling; (2) seeing, hearing, and speaking; (3) understanding,
6 carrying out and remembering simple instructions; (4) use of judgment; (5) responding
7 appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes
8 in a routine work setting. See 20 C.F.R. §§ 404.1521, 416.921.
9

10 The step two inquiry is a *de minimis* screening device to dispose of groundless claims.

11 See *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987). "If a claimant is unable to show that he has
12 a medically severe impairment, he is not eligible for disability benefits. In such a case, there is no
13 reason for the Secretary to consider the claimant's age, education, and work experience." (*Id.*) at
14 148. An impairment or combination of impairments can be found "not severe" only if the
15 evidence establishes a slight abnormality that has "no more than a minimal effect on an
16 individual's ability to work." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (internal
17 citations omitted).

18 In the present case, the ALJ noted that Dr. Press diagnosed a pain disorder with medical
19 and psychological factors, but that the evidence supported a finding that Plaintiff exaggerated the
20 degree of pain she experiences. Thus, the ALJ's credibility finding underlies his determination
21 that the pain disorder is not severe. Having concluded that the ALJ has failed to state clear and
22 convincing reasons for rejecting Plaintiff's pain testimony, this Court finds that the record does
23 not support a finding that the impairment is not severe.

1 D. Vocational Expert Testimony

2 Plaintiff argues that the ALJ erred in disregarding the vocational expert's testimony. The
3 ALJ in posing a hypothetical to a vocational expert "must set out all the limitations and
4 restrictions of the claimant." *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989) (quoting
5 *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). In the present case, the ALJ posed
6 hypotheticals that excluded certain limitations based on Plaintiff's pain testimony. At the hearing,
7 Plaintiff suggested alternative hypotheticals that incorporated such limitations. However, the ALJ
8 rejected the vocational expert's testimony regarding these alternatives. The Court finds that this
9 testimony should be reevaluated following reconsideration of Plaintiff's subjective testimony, her
10 pain disorder as a severe impairment, and the opinions of her examining physicians.
11

12 **VIII. CONCLUSION**

13 The Commissioner's determination to deny Plaintiff Supplemental Social Security Income
14 is neither supported by substantial evidence in the record nor free of legal error. Accordingly, the
15 Court REVERSES the Commissioner's decision and REMANDS for further proceedings.

16 DATED this 12th day of October, 2006.

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18 _____
19 MONICA J. BENTON
20 United States Magistrate Judge
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